



**THE SECRETARY OF VETERANS AFFAIRS  
WASHINGTON**

April 6, 2015

Glen W. Grippen  
Interim Medical Center Director  
Phoenix VA Health Care System  
650 E. Indian School Road  
Phoenix, AZ 85012

Dear Mr. Grippen:

I am responding to the issues raised in a November 4, 2014, memorandum from your facility about a grievance filed by the American Federation of Government Employees, Local 2382, regarding a registered nurse's rating in an annual proficiency report.

I have decided, on the basis of the enclosed paper, that a nurse's rating in an annual proficiency report concerns or arises out of professional conduct or competence. Consequently, and in accordance with 38 U.S.C. 7422(b), this rating cannot be challenged through negotiated grievance procedures.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert A. McDonald", is positioned above the printed name.

Robert A. McDonald

Enclosure



**THE SECRETARY OF VETERANS AFFAIRS  
WASHINGTON**

April 6, 2015

Louis Curry  
President, Local 2382  
American Federation of Government Employees  
c/o Phoenix VA Health Care System  
650 E. Indian School Road  
Phoenix, AZ 85012

Dear Mr. Curry:

I am responding to the issues raised in a November 4, 2014, memorandum from the Interim Medical Center Director for the Department of Veterans Affairs (VA) Phoenix Health Care System about a grievance filed by the American Federation of Government Employees, Local 2382, regarding a registered nurse's rating in an annual proficiency report.

I have decided, on the basis of the enclosed paper, that a nurse's rating in an annual proficiency report concerns or arises out of professional conduct or competence. Consequently, and in accordance with 38 U.S.C. 7422(b), this rating cannot be challenged through negotiated grievance procedures.

Sincerely,

A handwritten signature in blue ink, which appears to read "Robert A. McDonald", is located below the "Sincerely," text.

Robert A. McDonald

Enclosure

**Title 38 Decision Paper  
Department of Veterans Affairs (VA)  
Phoenix VA Health Care System  
Phoenix, Arizona**

**FACTS**

On July 25, 2014, a registered nurse (RN) at the Department of Veterans Affairs (VA) Phoenix Health Care System (Medical Center) was provided a copy of his annual proficiency report for the period of June 9, 2013 to June 8, 2014. (Exhibit 1). On his annual proficiency report, the RN received an overall proficiency rating of "Satisfactory" from his supervisor. (Exhibit 2). On the same day that the RN received his proficiency report, he met with the Associate Chief of Nursing Service for Ambulatory Care to discuss his concerns with his overall proficiency rating. (Exhibit 1).

The RN submitted a memorandum dated July 28, 2014, to Medical Center management stating that he disagreed with his overall proficiency rating. (Exhibit 3). In his memorandum, the RN listed a number of areas where his performance could have supported a higher proficiency rating, including, among other things, the following:

- engagement with the Medical Center's lesbian, gay, bisexual, and transgender (LGBT) committee;
- mentoring an employee who was preparing for the licensed practical nurse (LPN) program;
- improving the telehealth participation numbers for members on his Patient Aligned Care Team; and
- improving his team's two-day post-discharge performance.

(*Id.*).

The RN's memorandum concluded, "I believe that my performance listed by [sic] above examples, and my commitment to VA [sic] mission on my off time shows, that I have gone above and beyond a [sic] Satisfactory performance by a substantial margin." (*Id.*).

On August 22, 2014, the American Federation of Government Employees, Local 2382 ("Union"), filed a Step 1 grievance about the RN's proficiency rating. (Exhibit 4). In its grievance, the Union alleges that the RN's supervisor failed to talk to the RN about his performance deficiencies prior to lowering the RN's proficiency rating to satisfactory. (*Id.*). By failing to communicate with the RN about his performance deficiencies, the Union alleges that Medical Center management violated Article 27 of the Master Agreement between VA and the American Federation of Government Employees (Master Agreement), VA Directive 5013, and Medical Center Policy Memorandum

HRM/05-65, Performance Management System. (*Id.*). As a remedy to the grievance, the Union requested that the RN's overall rating be increased to "above Satisfactory." (*Id.*).

On September 5, 2014, the Medical Center denied the Union's grievance. (Exhibit 5). In its grievance response, Medical Center management stated that the Union failed to respond to management's request to meet to discuss the grievance. (*Id.*). The Medical Center also explained that the provisions in Article 27 do not apply to RNs "appointed under 38 U.S.C. § 7401(1)," and "the decision to rate [the RN's] proficiency at the Satisfactory level was based on matters concerning professional clinical competence." (*Id.*). The Medical Center further stated that it believed the issue was non-grievable because it is "covered under 38 U.S.C. § 7422." (*Id.*).

On September 8, 2014, the Union filed a Step 2 grievance concerning the RN's proficiency rating. (Exhibit 6). The Step 2 grievance repeated the complaints set out in the Step 1 grievance and the remedy requested by the Union remained the same. (*Id.*). On September 15, 2014, Medical Center management responded to the Union's Step 2 grievance by stating that grievances concerning a RN's proficiency rating are excluded by application of 38 U.S.C. § 7422. (Exhibit 7). The Medical Center also attempted to set up a meeting with the Union to informally resolve the grieved matter. (*Id.*). On September 16, 2014, the Union declined the Medical Center's offer to meet to discuss the grievance because the Medical Center alleged that the matter was non-grievable under 38 U.S.C. § 7422. (Exhibit 8).

On November 13, 2014, the Medical Center submitted its request for a 38 U.S.C. § 7422 determination to VA's Office of Labor-Management Relations.<sup>1</sup> (Exhibit 1); (Exhibit 9). The Medical Center also provided copies of its request for a 38 U.S.C. § 7422 determination and supporting documentation to the Union. (Exhibit 9). The Union did not file a response or rebuttal to the Medical Center's request for a 38 U.S.C. § 7422 decision.

### **AUTHORITY UNDER 38 U.S.C. § 7422**

The Secretary of Veterans Affairs has final authority to decide whether a matter or question concerns or arises out of professional conduct or competence, peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

---

<sup>1</sup> The request for determination is dated November 4, 2014.

## **ISSUE**

Whether a RN's rating in an annual proficiency report is a matter or question concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b).<sup>2</sup>

## **DISCUSSION**

Section 7422 grants limited collective bargaining rights to Title 38 employees. (38 U.S.C. § 7422(a)). Section 7422 specifically excludes any matter or question concerning or arising out of professional conduct or competence, peer review, or employee compensation, from "collective bargaining (and any grievance procedures provided under a collective bargaining agreement)." (38 U.S.C. § 7422(b)).

In the current case, the Union filed a grievance on behalf of an RN, alleging that the RN's supervisor failed to talk to the RN about his performance deficiencies prior to lowering the RN's proficiency rating to satisfactory. (Exhibit 4). By failing to communicate with the RN about his performance deficiencies, the Union alleges that Medical Center management violated Article 27 of the Master Agreement, VA Directive 5013, and Medical Center Policy Memorandum HRM/05-65, Performance Management System. (*Id.*).

### **A. The RN's proficiency rating was not lowered**

The Union's grievance is based on its belief that the RN's proficiency rating was "*lowered* without prior communications from" the RN's supervisor. (*Id.*) (emphasis added).

In the RN's 2014 proficiency report, covering the period of June 9, 2013 to June 8, 2014, the RN received a satisfactory rating in Category I – Nursing Practice, Category II – Interpersonal Relationships, and in his Overall Rating. (Exhibit 2). The RN received identical satisfactory ratings in Categories I and II, and his Overall Rating in the prior year's proficiency report, which covered the period of June 22, 2012 to June 22, 2013. (Exhibit 10).

Based on the evidence, it is clear that the RN, whose 2014 "Satisfactory" proficiency report rating is in dispute, received a similar "Satisfactory" rating on his 2013 proficiency

---

<sup>2</sup> "Professional conduct or competence" includes direct patient care and clinical competence. (38 U.S.C. § 7422(c)).

report. (*Compare* (Exhibit 2) with (Exhibit 10)). Consequently, the RN's proficiency rating was not lowered.

Even if I agree that the RN's performance rating was lowered to a satisfactory rating, VA policy does not require that a RN's supervisor talk to the RN about his or her performance prior to lowering the RN's proficiency rating. (See (Exhibit 11) (VA Handbook 5013, pt. II, ¶ 9e(1))).

In general, VA policy requires that "[a]t any time during the appraisal period when performance problems are observed which may be expected to result in a low/minimally satisfactory or unsatisfactory annual proficiency rating, the rating official will hold a counseling conference with the employee."<sup>3</sup> (*Id.*). The purpose of such a conference is to "inform the employee of the deficiencies, give the employee a reasonable opportunity to correct identified deficiencies" and "*demonstrate satisfactory performance.*" (*Id.*) (emphasis added).

In the current case, the RN's supervisor did not believe the employee's performance would result in a "low/minimally satisfactory or unsatisfactory annual proficiency rating." (*Id.*). Therefore, the RN's performance was rated satisfactory. As such, there was no need for the supervisor to meet with the RN to identify any performance deficiencies.

## **B. The Medical Center properly rated the RN's proficiency**

There is no indication that the Medical Center failed to follow the RN rating procedures set out in VA Handbook 5013.<sup>7</sup> The RN's supervisor appears to have carefully and comprehensively measured the employee's performance.<sup>8</sup> Indeed, in the proficiency report, the RN's supervisor cites to a number of the RN's accomplishments during the rating period.<sup>9</sup> (See Exhibit 2). These same accomplishments were later cited by the RN

---

<sup>3</sup> VA policy requires that supervisors counsel Title 38 employees at least annually. (VA Handbook 5013, pt. II, ¶ 9a). Based on the evidence, it is not clear whether the RN was counseled by his supervisor during the 2014 performance period. However, the crux of the Union's grievance lies in the argument that the employee should have been counseled once the supervisor planned on lowering his proficiency rating. For the reasons discussed *supra*, we believe that the supervisor did not lower the RN's proficiency rating. Consequently, no counseling was needed or required.

<sup>7</sup> While the Union claimed in its grievance that the Medical Center violated provisions of Article 27 of the Master Agreement, that article does not apply to Title 38 professionals. Requirements for appraising performance of RNs are found exclusively in VA Handbook 5013.

<sup>8</sup> The proficiency report is fifteen pages long; it includes narrative discussions of the employee's performance, as well as ratings in 100 separate activities. (Exhibit 2).

<sup>9</sup> The proficiency report favorably discusses the RN's mentorship of an employee completing the LPN program. (Exhibit 2). The report also discusses the RN's role on the Medical Center's LGBT committee

in his memorandum to Medical Center management expressing his disagreement with his proficiency rating. (See Exhibit 3).

Following a thorough evaluation, the RN's supervisor concluded that the RN's performance warranted an overall satisfactory rating, essentially a determination that "the employee fully met and sometimes exceeded expectations." (Exhibit 2); (Exhibit 13). At the request of the RN, the approving official met with the RN to discuss the "contents and conclusions of the report," an opportunity referenced in VA Handbook 5013. (Exhibit 1); (Exhibit 14). Also, in accordance with VA policy, the RN was allowed to, and indeed did, submit comments expressing his dissatisfaction with the proficiency rating for inclusion in his personnel folder.<sup>11</sup> (Exhibit 3); (Exhibit 14) (VA Handbook 5013, pt. II, ¶ 8(b)).

**C. The RN's proficiency ratings cannot be challenged through the negotiated grievance procedure**

While VA policy allows for consideration of employee disagreement or dissatisfaction with an annual proficiency rating, there is no mechanism for revisiting or challenging a Title 38 employee's proficiency rating through the negotiated grievance procedure.

VA has "long held that proficiency reports are non-grievable when they involve the substantive rating of an employee or clearly constitute an assessment of a provider's patient care duties." (Exhibit 16) (*VAMC Fort Wayne* (May 19, 2008)).

The "proficiency rating system is the vehicle for evaluation of a [RN's] professional competence and conduct." (Exhibit 17) (*VAMC Manchester* (Sept. 9, 1992)). Consequently, matters involving the proficiency rating system cannot be challenged through the negotiated grievance procedure. (*Id.*).

In *VAMC Ann Arbor*, the Under Secretary for Health reviewed a complaint concerning statements in a RN's proficiency report. The proficiency report described the RN's interpersonal relationships and customer service with co-workers and patient families as

---

and his responsiveness to LGBT issues at the facility. (*Id.*). The report credits the RN as "a trailblazer and a role model in home telehealth enrollment," and compliments his active participation "in improving the performance measures within primary care," including improving the two-day post-discharge call rate. (*Id.*).

<sup>11</sup> "If, after discussions with the rating official and the approving official, the employee disagrees with a proficiency rating, the employee may submit concise comments concerning the Proficiency Report through the rating and approving officials for filing in the personnel folder and/or Board Action folder." (Exhibit 14).



“neither becoming of a [VA] employee nor upholding [VA’s] customer service philosophy and gold service.” (Exhibit 15) (*VAMC Ann Arbor* (September 26, 2008)). As a result, the RN was rated an overall “low satisfactory” on her proficiency report. (*Id.*). The Under Secretary for Health concluded that “substantive ratings in proficiency reports, irrespective of the details of the report, *necessarily* involve issues of professional conduct and competence within the meaning of 38 U.S.C. § 7422(b).” (*Id.*) (emphasis added).

In *VAMC Fort Wayne*, the Under Secretary for Health found that the union’s requested grievance remedies, that the employee be given a fair and accurate proficiency report and that certain remarks be removed from the proficiency report, “involve [the employee’s] substantive proficiency rating and are therefore non-grievable . . . .” (Exhibit 16) (*VAMC Fort Wayne* (May 19, 2008)).

### **CONCLUSION**

The Union’s grievance does not show that the RN’s proficiency report was procedurally deficient. Moreover, the evidence does not support a finding that the proficiency report was rendered in a manner inconsistent with VA policy. Therefore, I have determined that the RN’s rating in his annual proficiency report is a matter concerning or arising out of professional conduct or competence, and is excluded from the negotiated grievance procedure by application of 38 U.S.C. § 7422.

### **RECOMMENDED DECISION**

A RN’s rating in an annual proficiency report is a matter concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b), and cannot be challenged through negotiated grievance procedures.

APPROVED/DISAPPROVED



Robert A. McDonald  
Secretary of Veterans Affairs

9/27/08

Date



Exhibit List – Phoenix VA Health Care System, Phoenix, Arizona

- Exhibit 1 Medical Center's Request for a 38 U.S.C. § 7422 Determination, filed November 14, 2014
- Exhibit 2 Employee Proficiency Report for period from June 9, 2013 to June 8, 2014
- Exhibit 3 Employee Memorandum Concerning Proficiency Report, dated July 30, 2014
- Exhibit 4 Union's Step I Grievance, dated August 22, 2014
- Exhibit 5 Medical Center's Step I Grievance Denial, dated September 5, 2014
- Exhibit 6 Union's Step II Grievance, dated September 8, 2014
- Exhibit 7 Medical Center's Invitation to Meet, September 15, 2014
- Exhibit 8 Union Declination to Meet to Discuss Informal Resolution, September 16, 2014
- Exhibit 9 Medical Center's Notice to Union, dated November 14, 2014
- Exhibit 10 Employee Proficiency Report for period from June 22, 2012, to June 22, 2013
- Exhibit 11 VA Handbook 5013, Part II, ¶ 9(e)
- Exhibit 12 VA Handbook 5013, Part I, ¶ 2(c)
- Exhibit 13 VA Handbook 5013, Part II, ¶¶ 8(c)(3) and (4)
- Exhibit 14 VA Handbook 5013, Part II, ¶ 8(b)
- Exhibit 15 VAMC Ann Arbor (September 26, 2008)
- Exhibit 16 VAMC Fort Wayne (May 19, 2008)
- Exhibit 17 VAMC Manchester (September 9, 1992)